No. 90 SECOND DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1948

E. A. HILL)
)
v.) From Nash
)
ATLANTIC COAST LINE)
RAILROAD COMPANY)

Before WILLIAMS, J., February Term 1948, Nash Superior Court - Plaintiff appealed from judgment of nonsuit.

SUMMONS dated November 13, 1946, showing service same date, appears in the original transcript of appeal.

AND THEREUPON the said E. A. Hill, plaintiff, by his attorneys COOLEY & MAY, came and complained as follows:

COMPLAINT

The plaintiff, complaining of the defendant, alleges:

1. That plaintiff is a resident of Edgecombe County, State of North Carolina.

2. That defendant is a corporation engaged as a common carrier in the transportation of freight and passengers, in Interstate Commerce over, along and upon its tracks which lie in Nash, Edgecombe and Wilson Counties in the

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State of North Carolina; that said defendant corporation, as plaintiff is informed and believes, was organized and is existing under and by virtue of the laws of the State of Virginia, but owns property and carries on its business in the State of North Carolina, being licensed to do so by the proper authorities of this State.

3. That on and prior to December 5, 1945, plaintiff was in the employment of defendant as a trainman and performed such duties as were assigned to him by defendant from time to time in connection with the operation of defendant's trains.

4. That on December 5, 1945, plaintiff was senior trainman on a train, designated as "Work Extra 1543", and that said train was engaged in transporting cross-ties to be unloaded and which said cross-ties were unloaded along defendant's southbound track between Contentnea and Lucama, in Wilson County, North Carolina; that, as part of plaintiff's duties, he was required to light the markers and place them on the front end of the locomotive; that this particular duty devolved upon him on said date by virtue of the fact that he was senior trainman and had elected to perform his duties on the front or end of the train where the locomotive was attached; that he had the right to make such election under the rules published by the defendant governing such work.

5. That on December 5, 1945, the train, work extra 1543, was made up of a number of gondola cars, eleven of which were loaded with cross-ties; that it was the duty of the workmen and employees in charge of said train to unload said cross-ties on that date between Contentnea and Lucama, North Carolina; that plaintiff went on duty at or about 6:15 A. M., December 5, 1945, and that the employees of the defendant proceeded to unload the cross-ties in the location above indicated; that, except for the time required to eat lunch, they engaged in said

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work all day up until about 5 P. M., when the atmospheric conditions became misty but not completely dark; that at or about 5 P. M., on said date, the conductor in charge of said train ordered the plaintiff to proceed from the engine to the caboose at the rear of the train for the purpose of procuring markers, lighting them and putting them in readiness to be placed on the front of the engine inasmuch as the conductor was expecting to order the train to travel in reverse in a northerly direction to the City of Rocky Mount; that at said point and at all points between Lucama and Contentnea, defendant maintains two separate tracks on which trains move, known as the northbound and southbound tracks.

6. That in obedience to the order of the conductor of said train, the plaintiff proceeded in the opposite direction from that in which the train was moving, toward the rear of said train on the west side thereof; that plaintiff elected to proceed to the rear of said train on the west side thereof because it was much safer for him to travel on the west side than it would have been for him to travel toward the rear on the east side of said train; that it would have been exceedingly dangerous for him to have proceeded to the rear on the east side of said train inasmuch as for him to have done so would have placed him in the dangerous position of walking between the north and southbound tracks where he might have suddenly found himself between the train to which he was assigned for duty and another train proceeding on the northbound track, at a high rate of spe that, if another train had come along on the northbound track in either direction, and he had been in between the north and southbound tracks, he would have been in great danger of being struck and injured by both trains on the north and on the southbound tracks, or by some object that might be falling or protruding fro either train; that, if he had walked on the ea side of the northbound track, he would have ru the risk of being separated from the train, to

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which he was assigned for duty, by the train proceeding on the northbound track between him and the train to which he was assigned; that, if another train proceeding on the northbound track, for example, a long freight train, had passed between him and the train, to which he was assigned, the train to which he was assigned would have been so far away from him by the time the long freight train passed that he could not have caught up with it and, therefore, he would have been subject to receiving demerits for permitting the train to which he was assigned for duty to get away from him; that plaintiff selected the safest course for him to travel to the rear of the train by electing to walk to the rear on the west side of the train to which he was assigned for duty, to-wit: Work Train Extra 1543; that immediately after the conductor ordered plaintiff to proceed to the rear of the train, the conductor himself decided to go to the rear of the train, and actually preceded the plaintiff in the direction of the rear of the train; that plaintiff proceeded in a northerly direction on the west side of said train in a careful, prudent and cautious manner, following substantially the same course as that pursued by the conductor, toward the rear for the purpose of procuring the markers as aforesaid; that plaintiff had walked to and from the rear of said train several times before on the same day; that, on the occasion when plaintiff was injured, he walked a safe distance from the side of the train in order to avoid being struck by any cross-tie or other object that might be in the process of falling or being thrown from any of the cars connected to said train; that when he approached an empty gondola car, which had already been unloaded, and which was just in front of the one from which cross-ties were being thrown, the plaintiff walked some 15 feet to a ditch on the west side of said train, crossed the ditch which was about two feet wide, and continued walking down the far side of said ditch with respect to said train, which said

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position placed him at a minimum of 17 feet from the nearest rail on the southbound track on which the train, from which cross-ties were being unloaded, was traveling at a slow rate of speed; that, while so walking along said ditch, as aforesaid, he approached the gondola car from which cross-ties were being thrown; that plaintiff's fellow-servants, who were unloading the cross-ties, due to the lateness of the hour, were unloading the cross-ties much more hurriedly than they had been unloading them when the plaintiff previously walked to and from the rear of the train at other times on said date; that while plaintiff was in the process of passing by said car from which cross-ties were being unloaded, a cross-tie suddenly and without warning was negligently, carelessly and with great force thrown across the ditch by plaintiff's fellow-servants and struck the plaintiff's right leg, breaking the same just above the ankle and tearing the flesh from the bone, leaving his foot and lower portion of his leg dangling by only a small portion of flesh and skin, and that, as a result thereof, the plaintiff was bruised and injured in other parts of his body and was otherwise seriously, painfully and permanently injured.

7. That the fellow-servants of plaintiff, engaged in throwing the cross-ties from the train, were not looking where the cross-ties might land after being thrown; that said cross-ties should have been merely raised up from the gondola car to the side of said car and permitted to fall to the ground and go only such distance as the natural momentum of said cross-tie might carry them, but at the time of plaintiff's injury, his said fellow-servants, with great force and violence, threw said cross-tie farther than was necessary or usual and against and upon the plaintiff; that said fellow-servants were not keeping a proper lookout for persons who might be walking along said tracks; that the defendant did not have a watchman or person stationed on or near said car, from

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which the cross-ties were being unloaded, to observe whether other employees, working on the train or walking along the tracks in the performance of their duties in the operation of said train, were approaching, and for the purpose of warning such persons of the danger involved; and, in failing to provide such a watchman and to give such warning, the defendant breached a legal duty which it owed the plaintiff, and such breach of duty constituted actionable negligence.

8. That the cross-ties, which the defendant, its agents, servants or employees, were unloading from the gondola car, had been treated with creosote and were slick and slippery; that the cross-ties, when unloaded from the gondola cars, normally fell only a few feet from the side of the car from which they were unloaded; that the cross-tie, which struck and injured the plaintiff, was negligently and carelessly thrown by the plaintiff's fellow-servants, who were defendant's agents, servants or employees, a greater distance and with greater force than the other cross-ties which were being unloaded from said gondola car, and that said cross-tie struck plaintiff while he was at a greater distance from the side of the car, from which it was thrown, than the other cross-ties, unloaded from said car, traveled before coming to rest; that the plaintiff, under normal conditions of unloading cross-ties of the same kind and character, and under the same working conditions, was walking a safe distance from the gondola car from which the cross-tie, which struck him, was thrown, and was purposely doing this to avoid injury to himself.

9. That the defendant owed plaintiff the duty of providing him with competent fellow-servants with whom to work and a safe place in which to work; that the defendant, at the time plaintiff was injured, failed to provide him, the plaintiff, with competent fellow-servants and a safe place in which to work; that defendant's failure to provide plaintiff with competent fellow-

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servants and with a safe place in which to work breached a legal duty which defendant owed to plaintiff, and such breach of duty constituted actionable negligence against the defendant.

10. That the acts, defaults and conduct of plaintiff's fellow-servants and employees, who were engaged in unloading the cross-ties from the gondola car, and in throwing said cross-ties over the side of said car upon the plaintiff, suddenly and without warning, and with greater force than was necessary and in utter disregard of the safety of the plaintiff and other trainmen, as hereinabove described, constituted gross negligence on the part of said employees, which said negligence is imputed to and actionable against the defendant.

11. That by reason of the fact that said cross-tie was thrown over the side of said gondola car upon the plaintiff, striking him on his right leg, the plaintiff's right leg was broken, his body was otherwise bruised and crushed and as a result thereof he was seriously, painfully and permanently injured; that, on account of said injuries, plaintiff has been rendered unable to perform ordinary manual labor, his earning capacity hasbeen practically destroyed, and he is now permanently disabled; that, in addition to the loss of time and earning capacity, plaintiff has suffered, continues to suffer and will permanently suffer great bodily pain and mental anguish; that plaintiff is advised and believes, and therefore alleges, that the injuries sustained by him as aforesaid are permanent and that by reason thereof he has been injured and damaged in the sum of $30,000.00.

12. That the negligence of defendant as hereinbefore set out was the direct and proximate cause of plaintiff's injuries and damage.

13. That the plaintiff was not guilty of any negligence or fault in any way contributing to the aforesaid injuries which he suffered as a

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result of the cross-tie being thrown upon him from the gondola car as hereinbefore alleged, and striking him on his right leg, breaking the same and otherwise injuring him as hereinbefore set out; that he received said injuries solely by reason of the negligence of the defendant, its agents, servants or employees.

WHEREFORE, plaintiff prays judgment of the Court that he recover of the defendant the sum of $30,000.00, together with the costs of this action, and that he have such other and further relief as he may be entitled to in the premises.

B. H. THOMAS,
COOLEY & MAY,
Attorneys for Plaintiff.

(Verified)

And the said defendant, by its attorney, F. S. SPRUILL, came and pleaded as follows:

A N S W E R

The defendant, answering the complaint of the plaintiff, says:

1. Paragraph 1 of the complaint is admitted.
2. Paragraph 2 of the complaint is admitted.
3. Paragraph 3 of the complaint is admitted.
4. Paragraph 4 of the complaint is admitted.
5. Paragraph 5 of the complaint is admitted.

6. Paragraph 6 of the complaint is denied, the true facts being set out in defendant's further answer.

7. Paragraph 7 of the complaint is denied, the true facts being set out in defendant's further answer.

9. Paragraph 9 of the complaint is denied.
10. Paragraph 10 of the complaint is denied.
11. Paragraph 11 of the complaint is denied.
12. Paragraph 12 of the complaint is denied.

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13. Paragraph 13 of the complaint is denied, the true facts being set out in defendant's further answer.

And for further answer and defense, defendant says:

(1) Plaintiff's own negligence contributed to and was the proximate cause of such injuries as he sustained, in that:

(a) At the time complained of the defendant was placing new cross-ties along its track for future use under its rails. These cross-ties had been hauled to the scene of the accident in gondola cars. These cars were being moved at about the rate of speed that a man would walk, and men in the gondola cars lifted and threw the ties over the side thereof, which were too high for them to see over, onto the ground beside the track. The movement of the train and the speed with which the ties were being thrown to the ground were so timed that these ties were strewn along the track at approximately the proper intervals.

(b) The plaintiff had observed this very operation all day long and had observed it day after day for a long time prior to this particular day, and was thoroughly familiar with exactly what was being done. Nevertheless, when he undertook to go from one end of the train to the other he walked along beside the train in utter disregard of his own safety (although the entire face of the earth was open to him on both sides of the cars), and he walked immediately into the path and under the ties which were being thrown from the gondola cars, and one of them struck him.

(2) The defendant pleads this contributory negligence of the plaintiff in diminution of his recovery herein, if any.

WHEREFORE, defendant prays that it go hence

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without day and recover its costs.

F. S. SPRUILL,
Attorney for Defendant.

(Verified)

And thereafter, at a regular term of the superior court of Nash County, begun and held on the 16th day of February 1948, with Hon. Clawson L. Williams, Judge presiding, the following proceedings were had: Thereupon, this cause coming on for trial, the following jurors, to-wit: Johnnie Ellis, and others (naming them) were chosen, tried, sworn and impaneled to try the issues joined between the parties, and at the close of plaintiff's evidence the defendant moved for judgment as of nonsuit and said motion was allowed by the court and the following judgment was rendered:

JUDGMENT OF NONSUIT

This cause came on for hearing before the undersigned and a jury at the February 1948 Term of Nash County Superior Court. At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit. The Court being of the opinion that the motion should be allowed:

It is, therefore, hereby adjudged that this action be, and the same is hereby dismissed as of nonsuit.

CLAWSON L. WILLIAMS,
Judge Presiding.

APPEAL ENTRIES

To the foregoing ruling and judgment, the plaintiff objects and excepts and appeals therefrom to the Supreme Court. Notice of appeal given in open Court. Further notice waived. Sixty days allowed plaintiff to make and serve statement of case on appeal. Thirty days thereafter allowed defendant to make and

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serve amendments or statement of counter-case. Appeal bond fixed at $50.00.

CLAWSON L. WILLIAMS, Judge.

And thereafter on the 1st day of April 1948, the following AGREED STATEMENT OF CASE ON APPEAL was filed:

Counsel For Plaintiff:
Messrs. Cooley & May and B. H. Thomas.

Counsel for Defendant:
Mr. F. S. Spruill.

Hon. Clawson L. Williams, Judge.

During the selection of the jury by counsel for the plaintiff, the regular panel was exhausted.

MR. SPRUILL: I am perfectly willing to agree to proceed on whatever number is left that we can agree on but I am entering objection now to the use of tales jurors. It would seem that the best thing to do would be to draw them from the box.

THE COURT: The regular panel of jurors has been exhausted?

MR. SPRUILL: Yes, sir.

THE COURT: How many challenges has the plaintiff used?

MR. SPRUILL: Three. There have been more excused in Your Honor's discretion.

THE COURT: Sheriff, go out and subpoena 8 or 10 freeholders who have not served on the jury in the last few years.

This was done, and the selection of the jury was completed.

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PLAINTIFF'S EVIDENCE

E. A. HILL, the plaintiff, testified: I am E. A. Hill of Rocky Mount. I was 35 years old yesterday. I am married and live with my wife in the city of Rocky Mount. I was born in Rocky Mount, Nash County. Have lived in Nash County all my life excepting ten years I lived in Greene County. On December 5, 1945, I was employed by the defendant, the Atlantic Coast Line Railroad Company. On the morning of that day my health was good. I began working with the Atlantic Coast Line Railroad Company March 2, 1942, and worked with them continuously up to December 5, 1945, employed as a fireman.

On December 5, 1945 I was working as a trainman. A trainman works either as a flagman or brakeman and I selected brakeman. On December 5, 1945 I was brakeman on a train known as Work Extra 1543. Charlie Boyette was the engineer, Alfred Sanders was the conductor and R. A. Eason, called "Flap," was the fireman.

On the afternoon of December 5, 1945, at or about the hour of 5 o'clock that train, Work Extra 1543, was located North of the station at Lucama, Wilson County, headed South. In the afternoon of December 5, 1945 I was injured on my leg, right leg, near Lucama, in Wilson County. Myself and the conductor and the engineer and fireman, all four on the engine passing time away, the section crew unloading ties. My job to get more cars to go and couple and couple cars, therefore, when unloading didn't have anything to do. We were in the engine talking. The train was in motion, unloading cross-ties, from gondolas, little higher than a flat car. They won't coal cars. I would say the height of the car is about 4 feet high, the side of the car about 4 feet from the floor, side 4 feet high. To begin with there were 12 cars hitched to the engine and cut one out at South Rocky Mount, in bad order, and that left 11. All were gondolas loaded with cross-ties, and a caboose.

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I was standing in the cab of the engine. The conductor turned around to me and said, "Hill, we got to leave here in a few minutes and back into Rocky Mount and have to cross over Lucama headed South and have to throw switches and back into Rocky Mount." In other words, the train was located at or about the time of the injury, two main lines, one North and one South, and at that place there was another track, call it a spur track. Generally speaking built out to one side to store camp cars for work crew.

After he told me to get the markers, just a few minutes after he spoke he got down and went side of the train. A marker is a light that is like the rear light on an automobile in one respect and has a yellow side and a green side and a red side. When train going down main line red side. When train going down you can turn the yellow to the side. It is a signal light. Train be pulling you can see the marker, can see the rear of the train. When I received that order to place the markers the conductor got down off of the West side, same side I got off. The markers were in the proper place in the cab, caboose. The markers referred to by the conductor in his conversation with me were in the cab. The conductor traveled North on the West side of the track. When I left the engine going to the caboose I traveled the same way, North, on the West side. The conductor or engineer or any other employee of the Coast Line did not direct me not to go on the West side nor warn me not to go on the West side. After I left the engine going to the place I was directed to go, like I said, the conductor preceded me to the back of the train. A walk place, line side of the track. I followed him, same direction he did. He got out and went around the cross-ties, went around good distance off the main line track. I followed him, about two car lengths ahead. They were already empty. Pitching out next to the cab approximately two car lengths ahead of where empty. I came in a circle and came out away from the ~~main line~~ to go around where they were throwing them at. They were

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turning them down close to the main line and I cuts me a circle. I went further west. Went at a safe distance. I was at least 17 or 18 feet from the southbound track on which the train was moving at the time I was injured. I was struck by something. There is a drain ditch 17 or 18 feet from the main line between the track I spoke of for camp cars. I was between that and naturally anybody walking on rough ground will notice where they are walking and that is the moment I got struck.

That track was located 10 or 12 feet from the Southbound main line, parallel. That storage track was not connected with the Southbound track. Not a switch to it. Had quit using it at that time, not in use at that time. In going from the engine I followed substantially the same course that had been followed by the conductor. I knew, of course, the train crew was unloading cross-ties. Been along there a dozen or two times that same day, using the same precaution. The ties had been creosoted. Made them slick like.

I was injured around 5 o'clock. May have been a few minutes afterward. It won't quite dark but dusk. Weather was misty, cold. They were at the time engaged in unloading the last of the 10 or 11 cars hitched to the train. I was struck by one of the cross-ties being thrown out. I was hit just above my ankle by the crosstie. The crosstie hit here (indicating), and all the bones flies out here clean to my ankle and therefore my ankle stays swelled now. Cast on it at the hospital bent my big toe down and all. I can't bend it straight. My leg was caught between the crosstie and the steel rail. I didn't see my leg until the first cast was taken off. It looked mighty bad. When struck by the crosstie I don't know who stopped the train. I know all I was doing was hollering, "Oh, my leg!" I couldn't say the crosstie was on me then. I tried to get out. It knocked all the feeling out. It was numb. Never been hurt before and tried to rub it and about that time

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the feeling come back and I fell down. When I fell across that empty track and skinned my arm and hurt my side, don't know whether I broke any ribs or not. I fell westerly from the train in the ditch I spoke about 17 feet from the track and water was in that ditch and it was cold. (The witness was requested to roll his pants leg up and show the injury to the jury which he did).

These marks have been there about two years on account of the cast was too tight. Here is where it struck me. These bones come out on this side. All this meat was laying on the bone the first time I ever saw it. Of course, I had to go back to the hospital twice. It got to running. It got infected. I was in the hospital 45 days the first time. Stayed on crutches ten weeks. I can't use my ankle and suffer from pain all the time.

On the day I was injured I suffered pain. Got my first medical treatment in Wilson. They said Dr. Woodard give me a shot in the arm and poured something on it. I don't know what, and it burnt mighty bad. They took me to the Coast Line Hospital in Rocky Mount. Dr. Bos treated me. Dr. Noell come in to see me but he never treated me. Dr. Bos was the surgeon. Dr. Bos did the work, placed the bone back in the leg and set it. I have suffered pain constantly from that time until now. They sent me to Richmond to have some braces made to wear on my leg. Had one made. Wore it about a month. That was at the suggestion of Dr. Bos, the surgeon for the Coast Line.

THE COURT: Gentlemen of the Jury, the fact that the railroad aided or assisted or helped him in treatment of the injury sustained is not any evidence of any liability on the part of the railroad of any injury that he may have sustained.

I was a paid-up member of the Relief Department which provides for hospitalization. I went

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to the place I naturally would have gone. I have followed strictly the advice of my surgeons or physicians with reference to my treatment. I have been able to work and earn a livelihood since the injury but I don't make as much as when railroading. It has been about $100.00 a month less than I did before. During that time I have suffered pain. Eight months after I got hurt I went to work for Pepsi-Cola Bottling Company. I worked for them before I went to the railroad and they liked my work and got me to come back. The only reason I could take that job, it was inspector's job, or I couldn't have gone back to work. I was employed there three and a half years before I went to work for the railroad and they got after me to come back and that suited me fine. At the time I was injured Mr. L. T. Starling was section foreman on that crew that day. I couldn't say where he was at the time I was injured on account of me being on the engine. He was in charge of the movement of the train and also was the conductor and in charge of the section crew, the men that unloaded the crossties. Mr. Starling was in charge of the unloading operation and in charge of the men that were doing the unloading. I couldn't say that he witnessed the injury to me. Neither he nor any of the other members of the train crew or unloading crew gave me warning not to go to the place where I was injured. They did not warn me of any danger there. I have seen Grant and Palmer and the employees of the Coast Line that were unloading the car. I know them when I see them. I couldn't name their names though. I couldn't rightly say what is the space of the distance between the northbound track and the southbound track at the point I was injured but I estimate 14 feet. I guess it may be around 14 feet between the ends of the crossties. The ends of the ties on the southbound track and the ends of the ties on the northbound were not over four feet. I couldn't say it was outside of the corporate limits of any incorporated town. I don't know how far

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those limits in Lucama are. It was just North of Lucama. Lucama is such a small town you can't tell when you are in it. It is a place where trains pass at fast speed on both tracks. Not that I remember or that I see them did I or any other member of the crew to my knowledge in going from the caboose to the engine use the East side of the track to walk on during the day. At that time trains frequently passed that place. Sometimes thirty minutes or fifteen minutes - all types of trains including freight trains. Several X-ray pictures were taken of my leg. They should be at the Atlantic Coast Line. I saw each of them. No X-rays of the bruises on other parts of my body. I was bruised on my left side. I complained to Dr. Bos several times. He never did take X-ray. The pain there is not anything now. Just once in a while it hurts a little. The worse trouble it seems like my right leg is longer than the left leg. Every time I buy a pair of trousers I have to have one cut off. I limp, this right leg. The limp is the result of the injury. If I walk and limp it doesn't hurt. Have to limp to get around standing on it. That is a direct result of the injury. Before the injury I did not have a bit of limp in the world.

I just couldn't hold any job now that require me to stand a long time on my feet. Every night in the two years since the accident my ankle swollen maybe a third larger than the left.

CROSS-EXAMINATION

To be exact I had worked for the Coast Line four and a half years before the accident. I started working with the company at this particular type of work in September '44. I had been braking a year and a half when I got injured. Had been doing this particular type of work for about a year and a half. These gondola cars are cars with sides but with no top. The sides are approximately four feet high. Have two types. These were the highest sides. Sides ran around four feet high. There were eleven o

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those high side gondolas filled with cross-ties to be taken out for placing alongside the track on this particular occasion. What the train crew, consisting of the engineer and fireman and conductor and brakeman, does is to haul that train, in this instance consisting of eleven high side gondolas, to the place the ties were to be unloaded and when they reach the place they are to be unloaded they are unloaded by the crew there for that purpose. So that during the unloading process the train crew has the duty only to keep the train moving and to look out for other trains that may be coming. They are responsible still for safety of the train at all times. We were there as lookouts. When the train gets to the place the ties are to be unloaded the engineer slows it down to a speed of something like about as fast as a man walks, to the speed of about three miles an hour. The unloading crew gets in these gondola cars and lift the ties up and over the side of the gondola car and let them fall to the ground beside the track. I couldn't say that the train is so timed that as the men lift and throw these ties out of the high side gondola over on the ground the train is moving at a speed which just about places these ties in a distance apart from each other. Sometimes they are fast and sometimes slow. Depend on how fast they get them up. The conductor and section foreman give the engineer signal how fast to move. After the tie has been thrown out another crew comes along and rearranges them. This is the method of unloading the ties from the gondola cars to the ground. Stretched out along beside the track so that when the next crew comes to put the ties in place they are strewn out along the track.

I wouldn't say I have been seeing that for a year and a half. I had been familiar with the work at the time I got hurt. I was working extra board. My regular job won't on the work extra. The fact that I was on extra board it happened to be my name was on the board that morning.

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As a brakeman for a year and a half I had been familiar with this method of unloading the ties. Most of the time have four to unload a tie if they can get hold of it. It takes four to get the tie up fast enough. A tie weighs about 250 pounds and is about 7 feet long. It is creosoted pine or oak, very heavy log that has been squared into a tie.

They don't exactly throw them over the side. Life them high enough to go above the side and let it tumble over the side. Those men are lifting and dumping over to the side one tie right after another just about as fast as they can lift one and dump it over the side they reach down and get another and dump it over the side and so on. That is the general idea. When they are inside those gondola cars and are lifting ties one right after another they could see outside if they wanted to and had time and sometimes they do. Their job is to unload those ties and most of the time their eyes and minds on that. Their minds should be on what they are doing but like other things sometimes it is not.

On this particular occasion those men were doing what they were supposed to be doing. It was my job to put up the markers. When the conductor said, "It is time to put up the markers" he got off of the engine and went back to the cab. I wouldn't say when the conductor got off of the engine he stepped across this little ditch into the road, highway that was right down beside the track and walked to the cab. Last I saw him just before I was struck he was getting on the rear of the cab. I wouldn't say he stepped across the ditch and stepped on the highway. I say I followed him to the rear of the train, same direction he took.

Q. He went far enough that he didn't get hit. You went down beside the train. Regardless of where the conductor went you went down beside the train?

A. No, I said I went behind the conductor, followed behind the conductor. I said I went

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beside the train behind the conductor until I got two car lengths from where they were throwing them out then I cut a circle same as he did. I didn't step across the ditch into the highway. That is not required of us. I didn't call any warning to those men throwing ties out that I was coming down beside the train.

RE-DIRECT EXAMINATION

Q. If the crossties had been dropped by the side of the car in the customary and ordinary way of discharging crossties would it have been possible for you to have been hit in the position you were in?

Objection by defendant - sustained - Plaintiff excepts. This is Plaintiff's EXCEPTION NO. 1.

A crosstie is approximately 6 feet or 6 1/2 feet long. I said I was 17 feet away when struck.

ALFRED M. SANDERS testified: I live in Rocky Mount. Am now employed and was employed in December 1945, by the Coast Line, as conductor, on December 5, 1945. I have been with the Coast Line since 1941. I was in charge of this train, Work Extra 1543. Mr. E. A. Hill was one of the trainmen on that train. He was head brakeman. Our train at that time was engaged in discharging and unloading crossties in Wilson County near Lucama, located on the southbound track. Mr. Hill, the plaintiff, was injured at 5:15 P. M. I had been with Mr. Hill in the cab of the locomotive just prior to the time he was injured. The engineer and fireman, Eason and Boyette, were also in the engine with me. Prior to the time I left the cab I gave Mr. Hill instructions to go get a marker off of the rear of the cab and bring it and put it on the engine. There were 10 or 11 cars and the caboose. We have to have a marker in the opposite direction in the way the train is running. It is a safety device and makes a

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train up. As soon as this last car had been unloaded it was my intention to direct it to back into Rocky Mount. After giving him that direction I got off of the engine and went to the rear of the train. I got off of the West side traveling North in the direction of the caboose. The train was in motion going South. The weather was hazy. It wouldn't have been long before it would have been dark. I would say the train was moving at a speed somewhere slower than a man can walk fast. I had overtaken the train, had walked 10 or 12 cars in the direction it was going and had walked pretty fast, three or four miles an hour. At the place we were discharging the ties there are two main line tracks of the Coast Line Railroad Company. I believe 60 miles an hour was the speed limit at that time on those tracks. The width between the ends of the crossties of the southbound and northbound tracks is approximately 3 feet. It was not safe for a man to walk between two trains on the east side because fast trains frequently pass.

In traveling from the caboose to the engine, as I had several times that day, I had walked on the northbound track sometime. Sometimes high terrain and sometimes low terrain. When I gave order to Mr. Hill to get the marker and put it on the engine I didn't give him any instruction how to do it. After giving that instruction I left the engine traveling north along the right of way. I didn't notice that he was following me.

The first thing that attracted my attention to Mr. Hill I reckon I about half saw the tie hit him and halfway heard him holler at the same time. I was the one who discovered he was injured. I hollered and told them to quit throwing crossties and stop the train. That was the last crosstie thrown. When I got to Mr. Hill he was laying on the west rail of the Temporary track with his foot in the ditch, his injured foot in the ditch. I called help to help me

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take him up and put him on the train. About that time two or three colored boys were there and Mr. Starling was there. We placed him on the train and gave him first aid treatment and then brought him to Rocky Mount. First tried to get a doctor in Lucama and he was not available. I have known Mr. Hill five or six years. Don't know his general character and reputation no more than just work with him.

CROSS-EXAMINATION

When I told Mr. Hill it was about time to get that marker then I left the engine to go back to the caboose. I went back on the west side. I stepped across the little ditch into the highway and went down the highway, I would say, 25 or 30 feet of the main line of the railroad. There was nothing that made it difficult for me to step right across to the highway. Several times during the day I had been up on both sides of the track. If I was on the northbound track and a train came along I would take to the ditch or something to get away from it. I wouldn't worry about being hit by a northbound train. I would say in going from the engine to the caboose I could have gone on either the east side or west side in perfect safety by looking out and watching both ways. That is what we were there to do, look out for it. A tie is a very heavy, cumbersome object. They hit the ground in all sorts of positions. Some hit endways, some sideways and some on a bevel or slant. Some of them will hit on one that has already fallen and bounce and whirl around. It is perfectly obvious to anybody who has had any experience in that line of work that it is dangerous to be walking along there when they are throwing ties out of those cars.

Q. Those men were doing exactly what they were supposed to be doing, were they not?
Objection by plaintiff. Objection overruled. Plaintiff excepts. This is plaintiff's EXCEPTION NO. 2.

A. Doing what they were supposed to be doing.

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Objection by plaintiff and motion by plaintiff to strike out answer. Motion to strike denied - plaintiff excepts. This is plaintiff's EXCEPTION NO. 3.

I said to Mr. Hill, "It is about time to put out the marker." He had to have it on there about the time we backed on the other track to go home. We were headed South on the southbound track and we were going to use a crossover to get back to Rocky Mount. Before we made a movement to go back to Rocky Mount the signal or marker had to be brought from the caboose to the engine. Best I could see Mr. Hill was in the vicinity where they were throwing crossties out. I didn't see exactly where he had walked but he was close enough to get hit. When you want them to stop you can tell them to stop and they do. As soon as I found he was hurt I told them to stop and they stopped. Not another tie was thrown. Just as soon as I said, "Stop throwing ties," they stopped.

RE-DIRECT EXAMINATION

I didn't hear anybody else warn Mr. Hill either.

RE-CROSS EXAMINATION

I didn't hear them warn him that they were going to throw a tie on him.

CHARLIE BOYETTE testified: I am Charlie Boyette. I was engineer on this train, Work Extra 1543, on the 5th of December 1945. I heard the conductor, Mr. Sanders, tell Mr. Hill we were going to be ready to back up to South Rocky Mount and wanted him to go to the cab and get a marker out of the marker bracket and bring it to the engine and place it on the front of the engine to make up the back-up movement. Then Mr. Sanders left the engine. He got down on the west side, my side. That is the same side Mr. Hill left the cab. They both traveled north after leaving my cab. I didn't hear anybody warn Mr. Hill. No warning. No direction

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other than the one Mr. Sanders gave Mr. Hill about obtaining the signal. That is usually left to the man's own judgment. I think it was Mr. Sanders who gave me the signal to stop the train after the accident. I got the information to stop and I did stop. I didn't leave the engine until we got to Wilson. I backed the train from Lucama into Rocky Mount. Went to the crossover south of where we were working and on the northbound and backed to Wilson and a doctor saw Mr. Hill and we proceeded to Rocky Mount. It was dark when we got to Wilson. I saw Mr. Hill at the passenger station in Wilson in the cab. You know he was in pain with his leg broke half in two. Bound to have been.

CROSS-EXAMINATION

They usually call the work train and get it to its destination by the time men go to work. I say approximately 7 o'clock. Of course we take time out for lunch and clearing trains. Except for such time as we took out for lunch and for clearing trains they had been unloading ties all day long. Those cars are approximately 5 feet high, high side gondolas. Generally two men pick them up and a third man boots them over the side in order to get them out of the car. Mr. Hill was right up there in the cab of the engine with the fireman and myself. Had been there approximately all day.

L. T. STARLING testified: I am L. T. Starling of Wilson. On December 5, 1945 I was employed by the Atlantic Coast Line Railroad Company and was working on Work Extra Train 1543 on that day. I recall the occasion when Mr. Hill was injured at Lucama, in Wilson County. I was foreman, supervisor of the crew of nine men that were unloading the car. At the time Mr. Hill was injured I was on my last car and I disremember whether 10 or 11 cars in the train. That was the last car I was to unload that day. That was coupled to the caboose, the caboose coupled to that. I had nine men in that gondola

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car unloading at the time. At the particular time I was standing on the end of the cab. A little ladder goes from the place you step up on it, goes to the top. I was standing holding the brace rod watching the men in the car. The first information I had that Mr. Hill had been injured Mr. Sanders, the conductor, hollered, "Hold The Ties." I hollered to my men. I had three men with a tie fixing to throw it over the top of the car. I hollered and they checked the tie and dropped it on the floor. Up to that time I had not given Mr. Hill any warning and had not heard the conductor or anybody give Mr. Hill any warning. I had heard none of the train crew say anything.

I didn't know Mr. Hill was there at that particular time. I went later to where he was. "Hoped" put him on the train. We didn't throw another tie. We stopped and come back to Rocky Mount. When I got to Mr. Hill I say he was around 17 feet from the West side of the south-bound track. His injured leg was in a little ditch we discussed about and approximately 17 feet from the rail to the bank of that ditch. It was 5 o'clock, or after. I think 10 or 15 minutes past 5. At that time we were about 26 miles from Rocky Mount. The weather was hazy, cloudy like, and cold and misty. It was my purpose to complete the unloading of that last car before returning to Rocky Mount and then knock off for the day. If it hadn't been for this injury I would have finished the car.

CROSS-EXAMINATION

The men picking up these ties out of the gondola cars and throwing them over the side and me there supervising, so intent on what we were doing you couldn't see over the side of the car unless they stop and walk to the edge of the car and look down that way. Mr. Hill gave no warning at all that he was going to walk under there. Just walked under and a tie went over and hit him. The conductor was up and down that train several times that day. Not with me. I stayed on the car I was working

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in. I stayed with my men all the time. It is nothing at all unusual for members of the train crew who are on the cab to go to the engine and those on the engine to go to the cab. They go out several distances from the car. At this particular place there was a street right there. I saw Mr. Sanders walking in the street.

Q. Those men in the cab going to the engine or in the engine going to the cab, no one says, "Look out, don't walk under those crossties," those railroad men are there for that particular purpose?
A. Yes, sir.

R. A. EASON testified: I am R. A. Eason. I live at Sharpsburg. Am employed by the Atlantic Coast Line Railroad Company. Been working with them about 4 years. I was working with them on December 5, 1945, in the capacity of fireman. I just know Mr. Hill was hurt on December 5, 1945. I don't know anything about it. I was on the other side of the engine. I was working at Lucama at or about the time he was injured. I was fireman on the engine. I was on the East side of the engine. Shortly before Mr. Hill was injured he had been in the cab with me and with the conductor, Mr. Sanders, and Mr. Boyette. We four were in the cab of the train. Mr. Starling was not in the cab of the engine. I heard Mr. Sanders tell Hill to get the markers off of the back of the cab and bring them and put them on the front of the engine, that we were going to back to Rocky Mount.

He and the conductor got off of the train on the west side and what they did then I don't know. Sanders got out of the engine first. I don't know where he went. I didn't see in what direction he left the cab. Mr. Hill got out of the cab right behind Mr. Sanders. I don't know where he went. I saw him laying on the ground after he got hurt. A few minutes elapsed after he left the cab before I saw him lying on the

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ground. I throwed in coal in the fire and put water in the engine and walked back to where he was laying in that dead track with his feet in the ditch. The track straddled the ditch. I didn't look to see if any water in the ditch. The weather was cold that day. Kinder hazy, foggy like. I don't reckon it was dark enough to use lights if they hadn't got them. The train was going five or six miles an hour at the time. Not very fast. I heard the conductor say we were going to Rocky Mount as soon as they got through unloading this last car. I don't know how much progress had been made in unloading that car. I didn't look in the car. I don't know whether it was half full or half empty. I have known Mr. Hill five or six years. So far as I know his general reputation is all right.

HERBERT PARRISH testified: I am Herbert Parrish. I live in Rocky Mount now and work with the Atlantic Coast Line Railroad Company. I was employed by the Atlantic Coast Line Railroad Company on December 5, 1945, and before then too. I was working on Work Extra 1543 on this particular day. Mr. Hill got hurt that day. My job was throwing out crossties. I sure was throwing out crossties at the time he got hurt. I mean I was throwing them too. I disremember which car it was. I disremember where the car I was throwing them from was with reference to the train. I had got tired and broke down. We were winding up in a hurry to go home. In throwing out the ties three of us work together. The operation we went through in throwing them depends on how they were laying. If laying on bad place have to take time. If in a good place the men catch hold of it and take it to us and throw it, lift it up and ~~let it go over the side~~. Throw them out endways or sideways, any way we could get them out up there. Didn't know anything about what was on the other side of the gondola. Only thing I know is get a tie up and let it go. When we pick a tie up and get it

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to the top let it go over and glad to let it go. Don't take any steps to see what it might hit. I figure this way, if anybody on the ground ought to know how to try to stay out of the way because we boys couldn't see what was going on. We were prevented from seeing because the side of the car was too high. Crosstie had been creosoted. I don't know that it made it easier but it made my face itch so bad I wish I had never seen one. Have to wear gloves. Creosote makes the tie slick and slippery. It is quite natural when ties falling in every direction they going to slide everywhere and hit everywhere. You can't place a tie "thout" you standing still. I sure don't know how far a tie that you raise to the top of the gondola and let go would fall from the western rail. Depend on how much speed you got behind it. If a man is rested up and not tired he got fast speed but after awhile he will slow down. Just like a mule. Take a mule he is rested up he goes fast. Sometimes fast and sometimes slow until you get broke down and then awful slow. All ties treated with creosote and I was treated too when I got through with those ties. Sometimes the ties that were dumped out of those cars would hit on the end, sometimes they hit flat, sometimes at an angle. Sometimes they hit on other ties that had been thrown out and if you dump one over that happened to hit another tie at an angle it would skid and bounce around. It made an area that a fellow would have to look out for. Even though we were worn out and tired at the end of the day me and the others in the car with me were doing exactly what we were supposed to be doing at the time but us boss always tells us when starting to work, "You all be particular. Don't get hurt. I don't want the men to get hurt. Don't hurt anybody." We were dumping these crossties out as we were supposed to do to get them out on the ground so they could be used.

The PLAINTIFF TENDERS for cross-examination,

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Willie Farmer, N. Grant, A. Harbin, and L. Spell, all of whom were sworn. No cross-examination.

DR. R. H. NOELL testified: I am Dr. R. H. Noell, of Rocky Mount. I am in charge of the Atlantic Coast Line Hospital at Rocky Mount. I have been with the Coast Line 29 years. (It is admitted that the witness is qualified to testify as a medical expert).

On or about December 5, 1945, I had occasion to see Mr. E. A. Hill, the plaintiff. He was admitted to the Coast Line Hospital at 7:30 in the evening of December 5, 1945. Dr. Bos was at the hospital at that time. Dr. Bos is now in Iowa. I have with me the hospital chart and pictures taken of Mr. Hill at the time he came in. I have examined him and those pictures. I exhibit the pictures to the jury. The picture shows the break. I have a picture taken before and after. Here is the fracture just above the ankle of the right leg. This is the large bone which is broken and the smaller bone here. Both bones were completely broken and one shattered. Big bone shattered. This is a picture after it was reduced and the cast applied. This does not show that the bone was completely healed. The day after it was put in the cast. I have a more recent picture of it. Here is one 2nd of February 1947, when the bone was healed. Fracture goes crossway on the big bone. At the time this picture was taken there was still a deformity in the bone. In my opinion that is a permanent deformity. That condition is permanent. The small bone will be as good as before but the larger one will not. The larger one has the worse deformity. That was broken worse than the other. Such injury as suffered by the plaintiff was calculated to cause physical pain. I don't think great pain but it did cause pain, I reckon severe at times. In my opinion I would think that injury is calculated to cause pain even

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this long after the accident or injury. At the time he came to the hospital he was not shocked. I don't remember that at the time he came to the hospital he had been given first aid in Wilson or some hypodermic. At the time I saw Mr. Hill that injury was calculated to cause swelling if the patient stood on it. I have seen him when it was swollen. He had a cut on the leg from the fracture. No part of the bone sticking out but it was exposed. I don't recall any injury to the other leg or any bruises on his back. He was in the hospital the first time from December 5th to January 18th, and the second time he came in on March 13th and went out on the 29th.

After his right leg had been set it was necessary to apply a cast to it. He wore the cast until February 18th. After removing the cast it was necessary for him to go on crutches but I can't tell exactly how long but some months afterwards. I recall that at a later date a brace was applied. That was done under my direction. I don't remember how long he wore the brace. He put it on in April but I don't know how long he wore it. He wore it a long time.

MRS. E. A. HILL testified: I am Mrs. E. A. Hill, wife of the plaintiff. On December 5th, 1945 I was living with my husband in Rocky Mount. He was at that time employed by the A. C. L. Railroad Company. I first heard of my husband's accident or injury that night. My sister came and told me after they had put the cast on and everything, after he had been admitted to the hospital. My sister was a nurse at the hospital at that time. She didn't call me immediately upon my husband's arrival. I had a small baby and she didn't want to tell me then. I went to the hospital the next morning. My husband was in bed. He was mighty weak and he cried. I visited him about every day while he was in the hospital. When I visited him I could see evidences of physical pain and

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suffering. After he got out of the hospital and came home I nursed him. When he came home he was in a weak condition, couldn't get about, walked on his crutches and he would fall. He had a cast on. After the cast was removed he still used crutches. I remember the time he wore the brace that was put on in Richmond. He has shown evidences of suffering since the injury all the time off and on up to the present time. If he works and stands on his feet he still complains of pain.

B. L. BUNN testified: I am B. L. Bunn of Rocky Mount. I been knowing the plaintiff since he was a boy, a little fellow. I been in Rocky Mount 41 years. Mr. Hill is my next door neighbor. Never heard anything against him. He is a good neighbor. Tends to his business and lets the other fellow alone. I would say he has a good character.

THE PLAINTIFF CLOSES.

At the conclusion of the plaintiff's evidence the defendant moves for judgment of nonsuit. The motion is allowed. Plaintiff excepts. EXCEPTION NO. 4.

ASSIGNMENTS OF ERROR

The plaintiff, E. A. Hill, groups his exceptions and makes the following assignments of error:

1. For that the Court erred in sustaining the defendant's objection to the following question:

Q. If the crossties had been dropped by the side of the car in the customary and ordinary way of discharging crossties, would it have been possible for you to have been hit in the position you were in?

As shown by EXCEPTION NO. 1 (R. p. 20).

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2. For that the court erred in overruling the plaintiff's objection to the following question and answer:

Q. Those men were doing exactly what they were supposed to be doing, were they not?

A. Doing what they were supposed to be doing.

As shown by EXCEPTION NO. 2 (R. p. 22).

3. For that the Court erred in denying plaintiff's motion to strike the following answer:

A. Doing what they were supposed to be doing.

As shown by EXCEPTION NO. 3 (R. p. 23).

4. For that the Court erred in allowing the defendant's motion for judgment as of nonsuit at the conclusion of the plaintiff's evidence.

As shown by EXCEPTION No. 4 (R. p. 31).

Respectfully submitted,

B. H. THOMAS,

COOLEY & MAY,

Attorneys for Plaintiff.

Service of the foregoing case on appeal, submitted by the plaintiff, in the case of E. A. Hill v. Atlantic Coast Line Railroad Company, is hereby accepted, this the 18th day of March 1948.

F. S. SPRUILL,

Attorney for Defendant.

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AGREEMENT OF COUNSEL

It is agreed that the foregoing shall constitute the case on appeal.

This 19th day of March 1948.

BEN H. THOMAS,
COOLEY & MAY,

Attorneys for Plaintiff.

F. S. SPRUILL,

Attorney for Defendant.

Filed April 1, 1948.

J. N. SILLS,

C. S. C., Nash County.

(TRANSCRIPT CERTIFIED BY CLERK SUPERIOR COURT)

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[fol. 34] SUPREME COURT OF NORTH CAROLINA

E. A. HILL, Appellate,

vs.

ATLANTIC COAST LINE CORPORATION, Appellee

Proceedings in the Supreme Court of North Carolina

Record on Appeal docketed and filed 23 day of April, 1948.
Appellants' brief filed 18 day of August, 1948.
Appellee's brief filed 2 day of September, 1948.
Cause argued before full bench of the court and submitted September 7, 1948.
Opinion filed, September 22, 1948.
Judgment entered, September 22, 1948.

Adrian J. Newton, Clerk of Supreme Court of North Carolina. (Seal.)

[fol. 35] SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1948

No. 90

E. A. HILL

v.

ATLANTIC COAST LINE RAILROAD COMPANY

Appeal by plaintiff from Williams, J., February Term, 1948, of Nash. Affirmed.

This was an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendant. The plaintiff at the time of the injury complained of was a brakeman in the employ of the defendant Railroad Company, and it was admitted that the defendant was engaged in interstate commerce, and that plaintiff was so employed.

The plaintiff's evidence tended to show that on December 5, 1945, he was on duty with a worktrain engaged in unloading crossties from gondola cars. The train was proceeding slowly as the ties were being thrown by workmen over the sides of the cars to fall along the west side of the track. As the plaintiff, in order to perform some duty, was proceeding from the engine to the caboose, he walked along on the ground parallel with the train, on the west side, and as he

was passing a car, at a distance of 17 or 18 feet, a crosstie thrown out struck the plaintiff on the leg and inflicted a serious injury. There was no evidence the workmen engaged in throwing out crossties saw the plaintiff or had reason to anticipate his walking along near the track at the time. The place where plaintiff was walking was farther from the cars than where the ties being unloaded usually fell. The manner in which the ties were being unloaded was the customary way for placing ties along the track for use. The plaintiff testified, "On this particular occasion those men (in the cars) were doing what they were supposed to do."

At the close of plaintiff's evidence the defendant's motion for judgment of nonsuit was allowed, and plaintiff excepted and appealed.

[fol. 36] Cooley and May for plaintiff, appellant.

F. S. Spruill, Thomas W. Davis for defendant, appellee.

DEVIN, J:

Upon the evidence presented, as it appears of record, the judgment of nonsuit was properly entered. The evidence fails to show, under the circumstances here, any duty incumbent upon the workmen on the cars, in unloading crossties in the usual way, to anticipate the movements and position of the plaintiff at the time of injury. Equally the evidence is wanting in probative value to show negligent failure on their part to perform a duty owed the plaintiff which proximately caused the injury complained of. Stated briefly, the evidence fails to make out a case of actionable negligence.

The plaintiff, however, insists that under the case of Griswold v. Gardner, 155 F(2), 333, decided May 15, 1946 (certiorari denied, 329 U. S. 725), this action coming within the provisions of the Federal Employers' Liability Act, and having been instituted for an injury to an employee of an interstate railroad, the court had no authority to grant a motion for nonsuit and take the case from the jury. In other words, it is suggested that the ruling of the Federal Courts has had the effect of converting the Federal Employers' Liability Act from a negligence statute into a workmen's compensation law, regardless of the question of negligence. But we cannot take this view. The Act itself, while depriving the defendant of certain common law defenses, bottoms the liability of the employer for injury to an employee upon negligence. In the case cited one Circuit Judge

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concurred in the result but disagreed with the statement that the Supreme Court had converted the Federal Employers' Liability Act into a compensation law, and the District Judge dissented.

In Wolfe v. Henwood, 162 F(2), 998, decided July 7, 1947, (certiorari denied), it was said: "But defendant's obligation was not such as to impose liability for injury regardless of due care and regardless of whether the injury was one reasonably to be anticipated or foreseen as a natural consequence of defendant's act. In order to recover under the Federal Employers' Liability Act, plaintiff had the burden of proving that defendant was negligent, and that such negligence in whole or in part caused Wolfe's injuries . . . [fol. 37] The recent Supreme Court decisions do not hold that a jury question is presented in every Federal Employers' Liability Act case. The plaintiff must still establish negligence of defendant as a contributing cause of injury . . . The Federal Employers' Liability Act does not subject a railroad to that degree of liability imposed by a workmen's compensation law, nor place the railroad in the position of an insurer of its employees." To the same effect is the holding in Eckenrode v. Pennsylvania R. R. Co., 71 Fed. Sup. 764.

In Ellis v. Union Pacific R. Co., 329 U. S. 649 (decided February 3, 1947) the Court said: "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be in whole or in part the cause of the injury." See also Brady v. Southern Ry. Co., 320 U. S. 476; Tenant v. R. R., 321 U. S. 29; Blair v. Baltimore & O. R. Co., 323 U. S. 600.

Plaintiff's exceptions to the ruling of the court on questions of evidence we find without substantial merit.

The judgment of nonsuit is

Affirmed.

A true copy.

Adrian J. Newton, Clerk of the Supreme Court of North Carolina. (Seal.)

[fol. 38] [Endorsed:] Wednesday Sep. 15, 1948. No. 90. Hill v. Railroad. Devin, J.: Affirmed. Filed Sep. 22, 1948, in the Office of Clerk Supreme Court of North Carolina.

[fol. 39] JUDGMENT

SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1948

Nash County

No. 90

E. A. HILL

vs.

ATLANTIC COAST LINE RAILROAD CO.

This cause came on the be argued upon the transcript of the record from the Superior Court, Nash County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable W. A. Davin, Justice, be certified to the said Superior Court, to the intent that the Judgment is Affirmed. And it is considered and adjudged further, that the Plaintiff do pay the costs of the appeal in this Court incurred, to wit, the sum of Sixteen and 60/100 dollars ($16.60), and execution issue therefor.

A True Copy.

Adrian J. Newton, Clerk of the Supreme Court.
(Seal.)

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[fol. 40] Clerk's Certificate

SUPREME COURT OF NORTH CAROLINA,
Raleigh, North Carolina

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina do certify that the foregoing is a true copy of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Supreme Court of North Carolina will constitute and is a true transcript of the record and proceedings in the said Supreme Court of North Carolina in said cause.

In testimony whereof, I have hereto set my hand and affixed the seal of the Supreme Court of North Carolina, Raleigh, North Carolina, this 9 day of December A. D., 1948.

Adrian J. Newton, Clerk of Supreme Court of North Carolina. (Seal.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 472

E. A. HILL,

Petitioner,

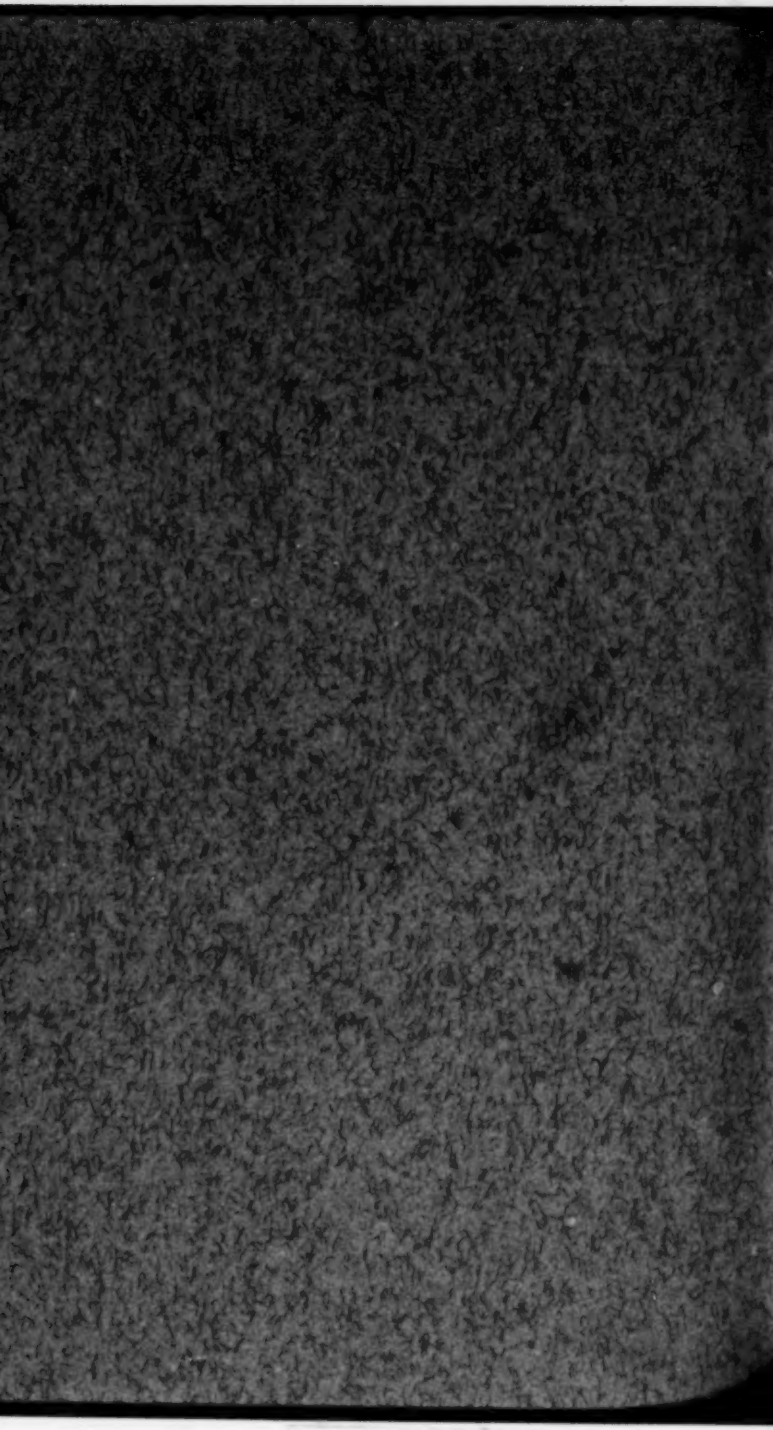
v.

ATLANTIC COAST LINE RAILROAD COMPANY,
a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

ISAAC D. TAYLOR,
HAROLD D. COOLEY,
HUBERT E. MAY,
(COOLEY & MAY),
FRANCIS E. WINSLOW,
(BATTLE, WINSLOW & MERRELL),
Counsel for Petitioner.



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(All cases cited on page seven of the petition.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 472

E. A. HILL,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

E. A. Hill respectfully petitions that a writ of certiorari issue to review the judgment the Supreme Court of North Carolina entered in this case on the twenty-second day of September, 1948.

A

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on the twenty-second day of September, 1948

(R. 37). The jurisdiction of this court is invoked under Chapter 646 Public Law 773, Eightieth Congress, 28 U. S. Code, Section 1257 (3), providing that final judgments entered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari, where any right is especially set up or claimed under the Statutes of the United States, and under 28 U. S. Code, Section 2101 (c), providing that the writ shall be applied for within ninety days after the entry of such judgment. This petition is filed on the 11th day of December, 1948.

The judgment complained of was rendered in an action brought by an employee of a railroad company against his employer for damages for personal injuries sustained by him by reason of the negligence of the railroad company, while the employee and the railroad company were engaged in interstate commerce (Complaint, R., page 1). That the defendant was engaged in interstate commerce and plaintiff was so employed is admitted by the answer (R. page 8) and found as a fact by the Supreme Court of North Carolina (229 N. C. at page 237, R. page 34). The case was determined by the interpretation and application of Federal Employers' Liability Act, 45 U. S. Code, Section 51 (opinion of Supreme Court of North Carolina at page 238, R., page 35). The case was tried and heard on appeal as one brought under the Federal act, and the plaintiff excepted to the judgment of nonsuit in the trial court and appealed therefrom to the Supreme Court of North Carolina, which affirmed the judgment. The judgment complained of adjudicates against the plaintiff, petitioner, a right claimed by him under a statute of the United States, and the Supreme Court of the United States has jurisdiction of the case.

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B

Statement of Matter Involved

The petitioner, E. A. Hill, was on duty as a trainman for respondent railroad company on December 5, 1945, with a work train engaged in unloading crossties from gondola cars and was seriously and permanently injured while on duty about 5 o'clock p. m. on that date, when he was struck by a crosstie on the right leg, lacerating the flesh, breaking the bone above the ankle, and inflicting a serious and permanent injury, at a place just north of Lucama in Wilson County, North Carolina. Action was instituted by him under the Federal Employers' Liability Act, 45 U. S. Code, Section 51, in the Superior Court of Nash County, North Carolina; at the conclusion of plaintiff's evidence, the Superior Court entered a judgment of nonsuit (R., page 10). On appeal, the Supreme Court of North Carolina affirmed, the decision and opinion of the court being published in the Advance Sheets, 229 N. C. Reports, at page 236 (R., page 34). The facts are as follows:

The petitioner, E. A. Hill, was on December 5, 1945, a married man, thirty-five years of age, employed by the Atlantic Coast Line Railroad Company as trainman. He had been working continuously for the defendant for three and one-half years. On December 5, 1945, he was assigned as a trainman on a train designated as Work Extra 1543. Alfred Sanders was the conductor (R., page 12). The train consisted of a locomotive and a caboose and eleven gondola cars in between (R., page 12). The gondola cars were loaded with crossties, which were creosoted and slippery (R., page 28). They were six or six and one-half feet long (R., page 20), either of pine or oak, squared logs, and weighed about 250 pounds each (R., page 19). L. T. Starling was the foreman or supervisor of a crew of nine men

(R., page 24) who were throwing the crossties over the west sides of the gondola cars as the train moved southerly at a very slow rate of speed, on the southbound track of the double-track railroad, between the town of Wilson and Lucama station. Three men worked together throwing over a tie (R., page 27). "Lift it up and let it go over the side" (R., page 27). By 5 o'clock in the afternoon of December 5, 1945, all cars had been unloaded except one, which was next to the caboose on the rear end of the train (R., page 24). The weather was hazy, cold and misty (R., page 25), and "it wouldn't have been long before it would have been dark" (R., page 21).

Both the petitioner, a trainman, and Mr. Sanders, the conductor, were in the cab of the locomotive, and the conductor ordered the petitioner to go to the caboose and get a "marker" (R., page 20) to place on the front of the engine. A marker is a rear light signalling yellow, green, or red (R., page 13), and is used on the front of the engine when the train is backing up. It was the conductor's intention to use the crossover track from the southbound to the northbound main line track just south of Lucama station, and proceed in reverse on the northbound track from that point twenty-six miles to Rocky Mound (R., page 21; R., page 23).

The petitioner in the performance of his duties of trainman had walked back and forth between the engine and caboose "a dozen or two times that same day" (R., page 14), using the same precaution (R., page 14). The conductor had made the same journey, from caboose to engine and back "several times that day" (R., page 21. On this occasion immediately after ordering the petitioner to go back to the caboose for the marker, the conductor himself got off the engine and proceeded ahead of petitioner to the rear of the train, on the west side of the track (R., page 21).

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The conductor did not instruct the petitioner which side of the train to use, but he testified (R., page 21), that the crossties of the southbound and northbound tracks are about three feet apart, that fast trains frequently pass and that "it was not safe for a man to walk between two trains on the east side" (R., page 21), and besides, if plaintiff had walked on the east side of the northbound track, a long freight train would have isolated him from the train to which he was assigned.

The conductor walked along side of train until he came close to the last gondola car, from which the crossties were being dropped over the west side, and then he circled to the west crossing a spur track and a small ditch alongside the spur track, and stepped over the ditch into the highway, some twenty-five feet from the southbound track of the railroad. (R. page 22.) He then proceeded to the caboose and was climbing up into it (R. page 19) when the petitioner, who had followed him to the rear of the train, "same direction he took" (R. page 19), was struck down by a crosstie, which had been thrown eighteen feet (R. page 14) from the southbound track, three times its length, at the drain ditch. "The place where plaintiff was walking was farther from the cars than where the ties being unloaded usually fell." (Statement of facts Supreme Court of North Carolina, 229 N. C. at page 237, R. page 35.) The men throwing the crossties were in a hurry to finish and go home and were heedlessly getting the ties over the side of the gondola car as rapidly and forcefully as possible. (R. page 27.) One witness said, "I mean I was throwing them, too."

The foreman or supervisor of the work crew was standing on the end of the caboose nearest to the gondola in which the men were working, holding to the brace rod, watching the men in the car. (R. page 25.) He saw the conductor walking from engine to the caboose (R. page 26,) a car length or less ahead of petitioner. He gave the petitioner

no warning, nor did he warn the workmen in the car that the conductor and the petitioner were walking up the track. (R. page 25). The workmen in the car could see over the side, which was four feet high. (R. page 12.) The foreman testified: It was "nothing at all unusual for members of the train crew who are on the cab to go to the engine and those on the engine to go to the cab." (R. page 26.)

The workmen themselves gave petitioner no warning of their intention to throw the tie further than was customary. Petitioner was injured while obeying an order of his superior in the same way he had performed that duty "a dozen or two" times that day in safety. Petitioner contended in the trial and on the appeal in the North Carolina courts that he was seriously and permanently injured by the negligence of the respondent "in whole or in part" in that

(a) The respondent failed to keep the place furnished him to work in as safe a condition as customary, and reasonable, as judged by the standards of a reasonably prudent man, and

(b) The respondent's agents and employees had reason to anticipate the movements and position of the petitioner at the time of the injury, and failed to warn him of the unusual action about to take place.

C

Question Presented

Whether in an action under the Federal Employers' Liability Act of April 22, 1908, as amended by the Act of Aug. 11, 1939, brought by a railroad employee against the railroad for damages for personal injuries sustained by him while working on the work train there was sufficient evidence of negligence on the part of the carrier for the case to be submitted to the jury.

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Reasons Relied on for Allowance of Writ

The Supreme Court of North Carolina has decided an important question of Federal law in a way probably not in accord with applicable decisions of the Supreme Court of the United States. From the meager explanation by the Supreme Court of North Carolina of the basis of its decision to affirm a judgment dismissing the action, which explanation is contained in nine lines of print (*Hill* v. *R. R.* 229 N. C. 237, 238, R. p. 35) it appears that the basis was the principle of law which ruled such cases at common law, to wit: That the master owes no duty to his servant working in a railroad yard or other similar place of danger with respect to the safety of the place to work, or with respect to the negligent acts of his fellow-servants, for that it is the servant's duty to look out for himself in such circumstances. The decision fails to take into account the fact that that principle of law was cast into oblivion in cases arising under the Federal Employers' Liability Act, as amended in 1939, as construed in *Tiller* v. *A. C. L. R. R.* 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 ALR 967, and *Tiller* v. *R.R.*, 323 U. S. 574, 89 L. Ed. 465, and *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. Ed. 916; and *Bailey* v. *Central Vermont R. R. Co.*, 319 U. S. 350, 87 L. Ed. 1444; and *Jacob* v. *City of N. Y.*, 315 U. S. 752, 86 L. Ed. 1166; *Ellis* v. *Union Pacific R. R.*, 329 U. S. 649, 91 L. Ed. 572; *Lillie* v. *Thompson*, — U. S. —, 92 L. Ed. Adv. Op. 115 (*per curiam*); *Johnson* v. *U. S.*, — U. S. —, 92 L. Ed. Adv. Op. 360; *Anderson* v. *Atchison, Topeka & Santa Fe R. R.*, — U. S. —, 92 L. Ed. Adv. Op. 840 (*per curiam*) and others.

A supplemental brief accompanies this petition.

Wherefore your petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the

Supreme Court of North Carolina entered by that court in this case on 22nd September, 1948, and that the said final judgment may be reversed by this Honorable Court and the case remanded to the Superior Court of Nash County, North Carolina, for a new trial, and that your petitioner may have such other and further relief as this Honorable Court may deem proper.

ISAAC D. THORP,
HAROLD D. COOLEY,
HUBERT E. MAY,
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FRANCIS E. WINSLOW,
(Battle, Winslow & Merrell),
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

E. A. HILL,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
a Corporation,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the Supreme Court of North Carolina is reported in the advance sheets 229 N. C. 236 (R. page 34). The Superior Court of Nash County, North Carolina, did not deliver a written opinion.

II

Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. Code, Sec. 1257(3). The judgment of the Supreme Court of North Carolina, sought to be reviewed, was entered on 22nd day of September, 1948 (R. page 37) and petition for Writ of Certiorari was presented within ninety days thereafter.

III

Statement of the Case

A statement of the case appears under the heading "B" of the Petition for Writ of Certiorari. In the interest of brevity that statement is not now repeated but is referred to with the request that it be considered as herein incorporated by reference.

IV

Question Presented

The question specifically brought forward by the Petition for Writ of Certiorari appears under heading "C" of the petition. Again, in the interest of brevity, it is not now repeated, but is referred to with the request that it be considered as herein incorporated by reference.

V

The Statute Involved

This suit was instituted under the provisions of the Federal Employers' Liability Act of April 22, 1908, Chap. 149, 35 Stat. 65; U. S. Code Title 45, Chap. 2, Sec. 51 et seq, as amended by the Act of Congress August 11, 1939, Chap. 685, Sec. 1; 53 Stat. 1404, hereinafter called the Act, and there is no issue as to its applicability. Sections 1, 3 and 4 of the Act, which are pertinent to the issues involved in this case, as amended read as follows:

Section 1 (45 U. S. Code 51): Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees from Negligence: Definition of Employees:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or

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between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, par. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, par. 1, 53 Stat. 1404.

Section 3 (45 U. S. Code 53): CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES:

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety

of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, par. 3; 35 Stat. 66.

Section 4 (45 U. S. Code 54): ASSUMPTION OF RISKS OF EMPLOYMENT:

That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, par. 4; 35 Stat. 66; Aug. 11, 1939, c. 685, par. 1; 53 Stat. 1404.

VI

ARGUMENT

Summary of Argument

1. The Federal Employers' Liability Act enlarges the common law liability of the master to his servant for personal injuries caused "in whole or in part" by the master's negligence by eliminating the fellow-servant rule, the doctrine of assumption of risk, and contributory negligence as defenses, and by setting up the rule of comparative negligence, so that even if the employee were in any way negligent himself he can still recover for injuries caused in whole or in part by the master's negligence, such amount as the jury shall determine to be fair compensation under the circumstances existing.

2. The sole question is whether the respondent was negligent in any manner which contributed to the injury. Peti-

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tioner's evidence of respondent's negligence was more than sufficient to justify submission of the question to the jury.

1

Hill did not assume the risks of negligence of respondent or its employees and is entitled to recover for such negligence, notwithstanding that he may himself have been guilty of negligence if the jury should so find.

This proposition was decided in *Tiller* vs. *A. C. L. R. R. Co.*, 318 U. S. 54, 87 L. ed. 610, 63 S. Ct. 444, 143 ALR 867, and the same case on second appeal, 323 U. S. 574, 89 L. ed. 465.

This decision has been so often followed that it is deemed unnecessary to cite additional authorities.

2

Petitioner's evidence of respondent's negligence warranted submission of the question to the jury.

The negligence alleged in the complaint (R. page 1, *et seq.*) was (1) that the respondent failed in its duty to furnish petitioner with a safe place to work, and (2) that the respondent's agents and servant, fellow-servants of the petitioner, suddenly and without warning, threw upon the petitioner a crosstie with greater force than was necessary, or customary, in that they threw the crosstie much farther away from the car than was usual, without warning the petitioner.

The respondent owed to the petitioner the duty of furnishing him with a safe place to work. That duty was a continuing one from which the respondent was not relieved by the fact that the petitioner's work at the place in question was "fleeting or infrequent"; and that duty became "more imperative as the risk increased". *Bailey* v. *Cen-*

tral-Vermont R. R., 319 U. S. 350; 87 L. Ed. 1444. This is a duty which the master could not delegate and for breach of which he would be liable, even at the common law, but under the Act here invoked the master is liable for breach of that duty even though the place is made unsafe by the act of a fellow-servant of the petitioner, without regard to the delegability of the duty.

Under the Act the master is liable to employees working in railroad yards and other similar places of danger, for the acts of any of its agents or servants, in performing their duties in an unusual and unexpected manner, without giving warning to other employees who might be endangered thereby. In *Tiller* v. *A. C. L. R. R.*, 323 U. S. 574, 89 L. Ed. 465, the court approved (323 U. S. 579, 89 L. ed. 470) the following charge to the jury: "The court charges the jury that if you believe from the evidence that Mr. Tiller was struck while the engine and cars of the defendant were making a back up movement on the night of March 20, 1940; that such movement was an unusual and unexpected one, and a departure from the general practice followed in making up train No. 209; that Mr. Tiller on the occasion in question was working on or near the slow siding without knowing or having reasonable cause to believe that such a movement would be made, then it became and was the duty of the defendant in making such movement to give adequate warning of the same, and if the jury believes from the evidence that the defendant failed to perform such duty and as a proximate result of such failure Mr. Tiller received injuries from which he died, then the jury should return a verdict for the plaintiff." As to that charge the court said through Mr. Justice Black: "The Circuit Court of Appeals held that there was substantial testimony to support a finding that the movement was an unusual one. Nevertheless, because no railroad rule or custom prohibited such an unusual movement, because some of the evidence

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showed that the same movement had been performed on other occasions, and because Tiller was familiar with the local situation, the Circuit Court of Appeals held that the railroad owed no duty to warn him of such an unusual movement. We *cannot say that a jury could not reasonably find negligence from the evidence which showed such an unprecedented departure from the usual custom and practice in backing cars without giving 'adequate warning of the movement'* ". The judgment of the Circuit Court of Appeals was reversed and the judgment of the District Court was affirmed.

Similarity between the second Tiller case (last above cited) and the case at bar is striking. In this case as in that the Appellate Court held that there was evidence that the movement was unusual. The Supreme Court of North Carolina in its statement of facts (229 N. C. 236 at 237, R. page 35) found: "The place where plaintiff was walking was farther from the cars than where the crossties being unloaded usually fell". Since the evidence in the case was sufficient to warrant this finding by the Supreme Court of North Carolina it is deemed unnecessary to further labor that point. However see R. page 19 where the petitioner Hill testified to the customary manner of throwing out the ties. He said "they don't exactly throw them over the side—lift them out enough to go over the side and let it tumble over the side".

So we have a case in which the ties were usually just "tumbled over" the side of the gondola car, but in which the petitioner was permanently injured by a tie which was, contrary to custom and practice, thrown a distance of 18 feet from the car. Before engaging in such unprecedented and dangerous practice the agents and servants of the respondent, if they had used due care, would have given warning to the petitioner to seek a place of safety, if they

as reasonably prudent men should have anticipated the presence of the petitioner in the area of danger. The Supreme Court of North Carolina held that the respondent had no duty to warn the petitioner of impending danger for the reason that its agents and servants had no reason to anticipate petitioner's presence there. The court found "there is no evidence the workmen engaged in throwing out crossties saw the plaintiff, or had reason to anticipate his walking along near the track at the time" (229 N. C. 237 R. page 35). This appears to be the crux of the decision.

Petitioner contends that the respondent's agents and servants either saw him or had reason to anticipate his presence, and that the jury could so find on the evidence in this case. Petitioner was required to act under the orders of the conductor. In the performance of his duties he had walked back and forth between the engine and cab "a dozen or two times that same day" (R. page 14), using the same procedure (R. 14). The conductor had made the same journey from cab to engine and back "several times that day" (R. page 21). The conductor testified that the other side of the track was unsafe because of the fast trains on the northbound track. The foreman or superintendent of the workmen in the gondola car who were engaged in throwing over the ties was standing on the end of the caboose, holding to the brace rod, overlooking the men in the car within a car length of the petitioner as he approached the area of danger, directly in the range of vision of the foreman, who admitted that he actually saw the conductor walking along the track at or near the same place less than a car length ahead of the petitioner, and the foreman testified that it was "not at all unusual for members of the train crew who are on the cab to go to the engine and those on the engine to go to the cab" (R. page 26). Upon this evidence the question whether the respondent's agents and servants saw the petitioner or as reasonably prudent

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men should have anticipated that he might be present, and should have looked out for him, was withdrawn from the jury and decided by the court against the petitioner, as a matter of law. This limitation on the function of the jury in this type of cases is contrary to the rule laid down by this Honorable Court. *Tiller* v. *A. C. L. R. R.* 318 U. S. 54, 87 L. ed. 610, 63 S. Ct. 444, 143 ALR 967; and *Tiller* v. *R. R.* 323 U. S. 574, 89 L. ed. 465; and *Lavender* v. *Kurn* 327 U. S. 645, 90 L. ed. 916; *Bailey* v. *Central-Vermont R. R. Co.*, 319 U. S. 350, 87 L. ed. 1444; *Jacob* v. *City of New York*, 315 U. S. 752, 86 L. ed. 1166; *Ellis* v. *Union Pacific R. R.* 329 U. S. 649, 91 L. ed. 572; *Lillie* v. *Thompson*, 332 U. S. 459, 92 L. ed. Adv. Op. 115 (*per curiam*); *Johnson* v. *U. S.* 333 U. S. 46, 92 L. ed. Adv. Op. 360; *Anderson* v. *Atchison, Topeka & Santa Fe R. R.*, 333 U. S. 821, 92 L. ed. Adv. Op. 840, (*per curiam*), and other cases.

Petitioner is in agreement with that part of the opinion of the Supreme Court of North Carolina which holds that the Act does not make the employer the insurer of the safety of the employees while they are on duty, and that the basis of his liability is his negligence, and that such negligence must be in whole or in part the cause of the injury. That the petitioner agrees is the law, and to that point the North Carolina Court devoted the greater part of its opinion, all but nine lines. The only part of that opinion which reveals the decision on the sufficiency of the evidence to put the case to the jury on the question of respondent's negligence, is contained in nine lines of print reading as follows: (229 N. C. 237-238, R. page 35).

"Upon the evidence presented as it appears of record, the judgment of nonsuit was properly entered. The evidence fails to show under the circumstances here any duty encumbent upon the workmen on the cars in unloading crossties in the usual way to anticipate the movements and position of the plaintiff at the time of injury. Equally the evi-

dence is wanting in probative value to show negligent failure on their part to perform a duty owing the petitioner which proximately caused the injury complained of. Stated briefly, the evidence fails to make out a case of actionable negligence."

The court cites no authority whatsoever to indicate the ground of its conclusions. The opinion does not explain in any way why the workmen on the gondola car and their foreman, who was standing in a high place overlooking the scene, were relieved of the duty of taking any care whatsoever of persons like the petitioner and the conductor who had been all day long walking up and down the track from the cab to the engine and back again in the performance of their duties. The Supreme Court of North Carolina, neither in its statement of the facts nor in its opinion, anywhere mentions the evidence above referred to, and relied upon as warranting a reasonable inference that the respondent's agents and servants had seen the plaintiff walking up and down the track and had reason to anticipate that his duties might require him to do so again. The inference is inescapable that the workmen had seen what was going on over the side of the car; and the evidence is direct from the foreman (R. page 26) that it was "nothing at all unusual for members of the train crew who were on the cab to go to the engine and those on the engine to go to the cab". But none of this is in any way referred to in the opinion of the court below. The court below contents itself with the statement that "there was no evidence" to support any such inference and relieves the respondent of any duty of looking out for the petitioner because, the court says, there was no such evidence. The Record shows that there was evidence and plenty of it.

The only reasonable explanation of the decision of the court below, since it failed to cite any cases arising under the Act to support its ruling, that occurs to the petitioner,

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is that the court was influenced by the common law doctrine that the master owes no duty to his servant working in a railroad yard, or other similar place of danger, with respect to the safety of a place to work, or with respect to the negligent acts of his fellow-servants, for that it is the servant's duty to look out for himself in such circumstances.

That is the doctrine of the assumption of risk which deprived servants of rights of action against their masters in circumstances in which a member of the public might have had relief. For example, in this case there was a roadway running parallel with the track, separated from the southbound track by a spur track and a ditch, upon which the public travels. If instead of propelling the crosstie three times its length from the car in their haste to get home, the respondent's workmen had propelled it four times its length into the highway, and if it had struck down a pedestrian on the highway, there would be no question about his right to recover. But the Supreme Court of North Carolina has decided that the petitioner, because he works for the respondent, is not entitled to recover where the crosstie was thrown the unusual distance of 18 feet, three times its length. There is evidence that his presence should have been anticipated at the point of danger as much as the presence of a pedestrian on the highway. Therefore the basis of the decision must be that the petitioner as an employee of the respondent had assumed the risk of the negligence of the respondent, its agents and servants. But in cases arising under the Act the defense of assumption of risk has been absolutely "obliterated" in a case in which the employer has been negligent. *Tiller* v. *A. C. L. R. R. Co.* 318 U. S. 54. And this Honorable Court has refused to permit its recrudescence under another label, to wit, a finding of "no negligence" on the part of the employer (318 U. S. 54, 66-67).

The theory that the Court below decided this case on the basis that the petitioner assumed the risks of his employment although the opinion does not mention assumption of risk, is bolstered by the fact that the Court below stressed a statement the petitioner made on his cross-examination to the effect that "on this particular occasion those men were doing what they were supposed to be doing" (R. page 19, opinion 229 N. C. at page 237, R. 34). The doctrine of assumption of risk means that the employee assumes the ordinary risks of his employment and it is evident that the Court below had this in mind, in stressing this statement. However, petitioner points out that the language is susceptible of two different interpretations by the jury. One reasonable inference from it is that the witness meant that the men were throwing out ties and that that was what they were hired to do, and that interpretation is in no way inconsistent with the petitioner's contention that the particular tie which struck him down was thrown further than was necessary or customary and was a sudden and unexpected action, which required a warning to him before it was done. The witness had previously testified that the men were "supposed" just to tumble the ties over the side of the car (R. page 19) and that and other evidence warranted the finding by the Court below (229 N. C. 237, R. page 34) that "the place where plaintiff was walking was farther from the cars than where the ties being unloaded usually fell" (R. 35).

How far the act has removed the doctrine of assumption of risk from this type of cases is illustrated by *Jacob* v. *City of New York,* 315 U. S. 752, a simple tool case, in which it is suggested that the Federal Employers' Liability Act, and the Jones Act, have probably eliminated entirely from cases arising under them, the simple tool doctrine, resting on the basis that the master is relieved of the duty of inspecting simple tools for defects because his servant's op-

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portunity for ascertaining such defects is equal to or greater than the master's. In that case, of a defective wrench, the Court held that the case should have been submitted to the jury.

In *Johnson* v. *United States*, 333 U. S. 46, 92 L. Ed., Adv. Op., page 360, decided February 9, 1948, a case arising under the Jones Act, applying the standard of liability of the Federal Employers' Liability Act, this Honorable Court applied the doctrine of res ipsa loquitur to the acts of a fellow servant in dropping a block upon the plaintiff working below him, saying through Mr. Justice Douglas that "A man who is careful does not ordinarily drop a block on a man working below him * * * and there is no reason in logic or experience why res ipsa loquitur is not applicable to acts of a fellow servant * * *. True, the doctrine finds most frequent application in cases of injuries arising from instruments or properties under the employer's exclusive control. * * * While the acts of negligence underlying such accidents may reach higher into the management hierarchy than the one involved here, the Federal Employers' Liability Act compels us to go no higher than a fellow servant * * * human experience tells us that careful men do not customarily do such an act."

If this case were submitted to a jury, the jury might speculate that the tie bounced eighteen feet after hitting the ground, or that it may have struck another slippery tie and ricocheted eighteen feet. This is pure guess or speculation and highly improbable. But there is direct evidence, not speculation, that the men were "winding up in a hurry to go home" and "I sure was throwing out crossties at the time he got hit. I mean I was throwing them, too" (R., page 27). From this evidence, without the application of the doctrine of res ipsa loquitur, the case is for the jury on the question whether the workmen carelessly or heedlessly threw the tie further than was necessary or customary,

striking down the petitioner, a fellow workman, who was where he was under orders from the conductor and whose presence under the evidence in this case should have been anticipated by the workmen. Petitioner respectfully suggests that under the Johnson case, even without this direct evidence of negligence, the doctrine of res ipsa loquitur would have required the submission of the case to the jury, as to the negligence of the workmen in the car.

But that isn't all. There is still the question of the negligence of the foreman, a fellow servant of the petitioner, who was standing on a ladder at the end of the caboose overlooking the gondola car, when the petitioner was less than a car length away and in his range of vision. The foreman actually saw the conductor who was walking a short distance ahead of the petitioner, and from his position the jury could reasonably infer that he actually saw the petitioner or that he should have seen him, and that if, as the respondent contended below, the crossties frequently bounced so far and that the petitioner "just walked under the ties," the foreman, seeing the petitioner walking into a death trap, should have given some warning either to the petitioner or to the men on the car. The petitioner testified that he was walking on rough ground, crossing a spur track and a ditch filled with cold water and was intent on picking his way across rough ground when he was struck. He said "anybody walking on rough ground will notice where they are walking and that was the moment I got struck" (R., page 14, near the top). He was in a difficult position and the foreman, looking right at him, was in position to help him.

Under the act here involved, it is no longer necessary to attempt metaphysical distinction between contributory negligence and assumption of risk. If the petitioner might reasonably have himself foreseen the danger of a tie being

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thrown eighteen feet, his negligence in not looking out for himself is not a bar to this action. Only a jury under our system of jurisprudence is authorized to make the adjustment and comparison between the negligence of the petitioner and the respondent.

VII

Conclusion

In conclusion counsel for petitioner respectfully submits:

1. That petitioner's evidence of negligence on the part of respondent was more than sufficient to justify reference of the case to the jury.

2. That the Judge of the Superior Court erred in refusing to submit the case to the jury on the issues of fact and in entering a judgment of nonsuit dismissing the case, and that the Supreme Court of North Carolina erred in affirming that action and refusing to remand the case for a new trial.

3. That a writ of certiorari, therefore, should be granted, and that this Court should review and reverse the decision of the Supreme Court of North Carolina and remand the case for a new trial.

Respectfully submitted,

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HAROLD D. COOLEY,
HUBERT E. MAY,
(Cooley & May),
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Counsel for Petitioner.

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[fol. 1] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 472

E. A. HILL, Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Respondent

ADDENDUM TO BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Isaac D. Thorp, Harold D. Cooley, Hubert E. May (Cooley & May), Francis E. Winslow (Battle, Winslow & Merrell), Counsel for Petitioner.

Copy was served on counsel for respondent December 28, 1948.

[fol. 2] In Norfolk and Portsmouth Belt Line Railroad Co. vs. Jones, 183 Va. 536, 32 S. E. 2nd 720 (Jan. 15, 1945), where one not an employee of the railroad, but whose presence in the danger area should have been anticipated by Wilkins, the foreman of the railroad's work crew, was killed by a steel rail thrown over the side of a gondola car by the work crew, the court held the railroad liable for the negligence of Wilkins. The evidence fixing upon Wilkins the duty to keep a lookout for plaintiff's intestate was similar to the evidence in this case. The court said at 32 S. E. 2nd, p. 724:

"It is said that it is not necessary to take precautionary measures where the injury could not have been anticipated. A witness was asked:

"Q. This path that you say Mr. Reynard was on, had you seen other people use that path? A. Sure, we all walked up and down that way. There was no other way."

And at page 725:

". . . Those coming from the east would have passed no one but would have been in plain sight of Wilkins for an indefinite distance. Wilkins knew or should have known

that this paymaster on Saturdays came to and settled with men on the job. He was, as we have seen, a part of the Shaner men assigned to this work. They had to go there and lay rails, and he had to go there and pay them off. • • •

"(10) If Wilkins had looked down this walkway to the east he could not have failed to see Reynard. The plain fact is that he did not look. • • • And in this connection we might say once and for all that the failure to note Raynard's approach was actionable negligence whether Reynard was an invitee or a licensee . . ."

The Court is respectfully requested to consider this additional authority on behalf of petitioner.

Copy of this addendum was served on counsel for respondent on December 28, 1948.

Isaac D. Thorp, Harold D. Cooley, Hubert E. May (Cooley & May), Francis E. Winslow (Battle, Winslow & Merrell), Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 472.

E. A. HILL, *Petitioner*,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

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E. A. HILL, *Petitioner,*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a corporation, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RESPONDENT'S STATEMENT OF FACTS.

The statement of facts in petitioner's petition and brief lacks so much of painting the true picture presented by the testimony in the trial of this case that respondent deems it necessary to also set out the facts:

The defendant was required to introduce no evidence so that all of the facts appearing in the record came from plaintiff's own witnesses.

At the time in question the plaintiff was a member of a train crew which was moving a train, made up of eleven gondola cars, slowly along the track while a crew of laborers was unloading cross-ties from these cars by lifting them and tossing them over the sides of the cars (R. pp. 17-18).

"After the (cross) ties have been thrown out another crew comes along and rearranges them. This is the method of unloading the ties from the gondola cars to the ground, stretched out along beside the track so that when the next crew comes to put the ties in place they are strewn out along the track" (R. p. 18).

"On this particular occasion those men were doing what they were supposed to be doing" (R. pp. 19, 28).

The plaintiff "had been doing this particular type of work for about a year and a half" (R. p. 17).

The plaintiff "had elected to perform his duties from the front end of the train where the locomotive was attached." (Paragraph 4 of Complaint, R. p. 2.) So that when the time came for him to put up signal markers on the other end of the train he had to walk from the engine to the caboose.

He could have done this in complete safety by stepping out into the highway paralleling the track as his conductor did (R. p. 22). But, instead, he walked down beside the track and under the falling cross-ties. And he did this, notwithstanding, "I didn't call any warning to those men throwing ties out that I was coming down beside the train" (R. p. 20).

ARGUMENT.

Summary of Argument.

The sole question before this court on this petition for certiorari is whether there is any substantial evidence in the record of negligence by respondent or its employees which contributed to petitioner's injury. As we will later point out, there is no question whatever of assumption of risk involved, either under the pleadings, evidence, or the State Supreme Court's opinion. We will not, therefore, here discuss the sub-division No. 1 of Petitioner's argument relating to assumption of risk.

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I.

There is no substantial evidence in the record of negligence by respondent proximately causing Petitioner's injury, so that judgment of non-suit was properly rendered.

Preliminary to discussing the facts on the question of negligence, respondent wishes to comment on the statements on Page 17 of petitioner's brief to the effect that the State Supreme Court devoted the greater part of its opinion "all but nine lines" to the question that the Federal Employers' Liability Act does not make the employer an insurer of the safety of employees. Respondent wishes to point out the reason the State Supreme Court devoted so much of its opinion to this question. It was because appellant's brief in the State Supreme Court was almost wholly based on the case of *Griswold* v. *Gardner*, 155 F. 2d 333, and after stating on Page 11 of appellant's brief that "the plaintiff contends it is (the Griswold case) the pertinent law applicable to the facts in this case" their brief then proceeded to quote the opinion in the Griswold case at some length. This is, therefore, obviously the reason why the North Carolina Supreme Court devoted some of its discussion to the Griswold case and the proposition contended for by petitioner. However, the other points raised here were raised before the Supreme Court of North Carolina, and the Supreme Court of North Carolina considered the evidence appearing in the record and held that it was insufficient to show any negligence upon the part of the respondent or its employees and "fails to make out a case of actionable negligence".

It is refreshing to note that the petitioner *now* agrees with the opinion of the North Carolina Supreme Court that the F. E. L. A. does not make the employer the insurer of the safety of employees, and that the basis of liability is employer's negligence.

Petitioner's petition and brief, as we understand them, appear to assign two possible grounds of negligence by

respondent under the evidence, which it is contended the State Supreme Court did not consider:

A.

Petitioner's contention is that L. T. Starling, Foreman in charge of the men unloading the ties, did not see and warn petitioner of the danger; and

B.

Petitioner's contention is that the place where petitioner was walking when injured was further from the cars than where the ties being unloaded usually fell.

In considering petitioner's contention A, above set out, it is necessary to quote at length from the evidence of Mr. Starling. He says (R. pp. 24, 25 and 26):

> "At the time Mr. Hill was injured I was on my last car and I disremember whether ten or eleven cars in the train . . . I had nine men in that gondola car unloading at the time. At the particular time I was standing on the end of the cab . . . I was standing holding the board rod *watching the men in the car.* The first information I had that Mr. Hill had been injured Mr. Sanders, the conductor, hollered, 'Hold the Ties' . . . I hollered and they checked the tie and dropped it on the floor . . . The men picking up these ties out of the gondola cars and throwing them over the side and me there supervising, so intent on what we were doing you couldn't see over the side of the car unless they stop and walk to the edge of the car and look down that way. *Mr. Hill gave no warning at all that he was going to walk under there. Just walked under and a tie went over and hit him.* * * * It is nothing at all unusual for members of the train crew who are on the cab to go to the engine and those on the engine to go to the cab. They go out several distances from the car. At this particular place there was a street right there. I saw Mr. Sanders (the conductor) walking in the street.
>
> Q. Those men in the cab going to the engine or in the engine going to the cab, no one says, 'Look out,

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don't walk under those crossties,' those railroad men are there for that particular purpose?
A. Yes, sir."

From the foregoing, it will be seen that Mr. Starling, plaintiff's own witness, was not there for the purpose of keeping a lookout for petitioner, but for the purpose of supervising the unloading of the cross-ties by his crew, and that that is what he was doing. He was not there for the purpose of giving a warning to petitioner. Petitioner had been doing this type of work for a year and a half (R. p. 17) and had been on this particular operation the entire day. If any warning was to be given that he was going to walk down beside the train under the falling timbers, he was the one to give it and, in his own words "I didn't call any warning to those men throwing ties out that I was coming down beside the train" (R. p. 20). Furthermore, by taking one short step across a ditch petitioner would have had an absolutely safe place to walk in a paved highway. This is what Conductor Sanders did (R. p. 22), but petitioner says "I didn't step across the ditch into the highway" (R. p. 20). Furthermore, the men unloading the ties could not see petitioner walking down beside the train, but he himself says (R. p. 19) "their job is to unload those ties and most of the time their eyes and mind are on that. Their minds should be on what they are doing but like other things sometimes it is not", and petitioner's own witness, Parrish (R. p. 28) says "we were prevented from seeing because the side of the car was too high."

No matter what is said or what argument is made, the conclusion is inescapable that petitioner, in utter disregard of his own safety and without any warning whatever to respondent that he was going to do so, deliberately walked into the path of falling cross-ties which he knew to be falling, which he had observed falling all day long and which he had seen falling for a year and a half. Furthermore, the conclusion is inescapable that respondent was

not guilty of negligence because the petitioner himself and his own witnesses say that all of the men there, except petitioner, were doing exactly what they were supposed to be doing.

The question of assumption of risk is not raised in this case; the issue is not raised in the pleadings; it is not raised in the evidence; it is not raised by the Supreme Court of North Carolina. The sole question is, was there any substantial evidence of actionable negligence on the part of the respondent. How can that question be answered yes when all of the men were doing exactly what they were supposed to be doing? The trial court held that there was no evidence of negligence, and that holding was affirmed by the Supreme Court of North Carolina.

It will be here appropriate to refer to the case of *Norfolk & Portsmouth Belt Line R. Co.* v. *Jones*, 183 Va. 536, 32 S. E. 2d 720, the citation to which was served on respondent by petitioner after petitioner's brief and petition had been served on respondent. This case is easily distinguishable in its facts and holding from the facts in the Hill case now before this court. The opinion of the Virginia Supreme Court of Appeals shows that plaintiff's intestate, Reynard, was an employee and paymaster of a contractor whose men were working in unloading rails for the defendant Belt Line at the time of the injury, but the operation was being done under the supervision of the defendant's foreman. The undisputed evidence as set out in the opinion shows that the operation was done by dropping a rail from one side of the car and then moving the train forward one-half a rail length and dropping another rail on the other side. In the course of his work, plaintiff's intestate was walking along the path close to the track and had not been warned by anyone that a rail was going to be thrown over the car and the rail struck him and injured him. The undisputed evidence showed that all of the employees walked along the path and "there was no other way" to walk. The undisputed evidence further showed that defendant's foreman

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had undertaken to keep a lookout and warn any employee who might be passing when a rail was to be thrown out. He was stationed on the car for that particular purpose and the court says, "The defendant recognized the duty which rests upon it. Wilkins, the foreman, *undertook to look*. Manifestly he performed that duty in a highly inefficient way. It was not reasonably effective, and it was not effective at all." (Italics ours.) The court further states, "Moreover, as we have seen, precautionary measures were actually taken. (That is, the foreman was stationed as a lookout.) The lookout did not look. * * * A lookout's duty is to look and to look at a time when looking will be effective." From the testimony of plaintiff's own witness, Starling, in the present case, it is clear that he was not on the car from which the rails were being thrown for the purpose of looking out and giving a warning, as was the foreman in the Belt Line case, but for the purpose of supervising the men who were actually doing the unloading, and as a matter of fact he did not know that petitioner Hill was near the car at the time he was injured. Respondent therefore submits that the Norfolk & Portsmouth Belt Line R. Co. case is not at all in point under the facts of the instant case.

We next consider

B.

Petitioner's contention is that the place where petitioner was walking when injured was further from the cars than where the ties being unloaded usually fell.

Respondent concedes that the above language is taken from the statement of facts appearing in the opinion of the Supreme Court of North Carolina, but, frankly, we are unable to find in the record anything to support that statement. The nearest that we come to it is Record, p. 20, where it appears that this question was asked:

"Q. If the cross-ties had been dropped by the side of the car in the customary and ordinary way of discharging cross-ties, would it have been possible for you to have been hit in the position you were in?"

However, the record does not disclose any answer to this question, and we are constrained to believe that the Supreme Court of North Carolina included the above quoted statement in its recital of facts for the purpose of showing that even if a cross-tie did go an unusual distance that did not constitute an act of negligence on the part of the respondent because that is literally what the Supreme Court of North Carolina held.

Petitioner testified (R. pp. 13, 14), as follows:

"The conductor traveled North on the West side of the track. When I left the engine going to the caboose I traveled the same way, north, on the West side. The conductor or engineer or any other employee of the Coast Line did not direct me not to go on the West side nor warn me not to go on the West side.

"After I left the engine going to the place I was directed to go, like I said, the conductor preceded me to the back of the train. A walk place, line side of the track. I followed him, same direction he did. He got out and went around the cross-ties, went around good distance off the main line track. I followed him, about two car lengths ahead. They were already empty. Pitching out next to the cab approximately two car lengths ahead of where empty. I came in a circle and came out away from the main line to go around where they were throwing them at. They were turning them down close to the main line and I cuts me a circle. I went further west. Went at a safe distance. I was at least 17 or 18 feet from the southbound track on which the train was moving at the time I was injured . . .

"That track was located 10 or 12 feet from the Southbound main line, parallel . . . In going from the engine I followed substantially the same course that had been followed by the conductor. I knew, of course, the train crew was unloading cross-ties. Been along there a dozen or two times that same day, using the same pre-

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caution. The ties had been cresosoted. Made them slick like."

Furthermore, the record shows on page 28, by petitioner's own witness, Parrish, the following:

"Sometimes the ties that were dumped out of these cars would hit on the end, sometimes they hit flat, sometimes at an angle. Sometimes they hit on other ties that had been thrown out and if you dump one over that happened to hit another tie at an angle it would skid and bounce around. It made an area that a fellow would have to look out for."

It becomes obvious, therefore, from petitioner's testimony that there is no well-defined area within which ties usually or customarily come to rest when dumped from a gondola car and petitioner, with his long experience, must have been fully advertent, or should have been fully advertent, to that fact.

But, even if it be conceded that there is some evidence that the tie went further than usual, it must also be conceded that the record does not show the usual distance ties go, but to the contrary, that there is no well defined area within which ties come to rest, and it must also be borne in mind that both lines of evidence come from petitioner's own witness.

As said in *Gunning* v. *Cooley*, 281 U. S., 90, pp. 94-5:

"Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury. *Peoples' Sav. Bank* v. *Bates*, 120 U. S. 556, 562, 30 L. ed. 754, 756, 7 Sup. Ct. Rep. 679; *Southern P. Co.* v. *Pool*, 160 U. S. 438, 440, 40 L. ed. 485, 486, 16 Sup. Ct. Rep. 338. 'When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.' *Ewing* v. *Goode* (By Taft, Circuit Judge) (C. C.) 78 Fed. 442, 444. See *Patton* v. *Texas Pac. Ry. Co.*, 179 U. S. 658, 663, 45 L. ed. 361, 364, 21 Sup. Ct.

Rep. 275; *New York C. R. Co.* v. *Ambrose*, 280 U. S. 486, ante, 562, 50 Sup. Ct. Rep. 198."

It is difficult to comprehend how the petitioner can say in one breath that the cross-tie was thrown out in an unusual manner, and in three other places in the record put in evidence to the effect that the men were doing exactly what they were supposed to be doing.

The case of *Wolfe* v. *Henwood, Trustee, St. L. S. W. R. Co.*, 162 F. (2d) 998, is remarkably pertinent to this case. In that case Wolfe was required to clean out an oil pit and his clothing became saturated with oil and gasoline. He struck a match to burn some waste which he had piled up and the flame ignited his clothing, and he was burned to death. The Circuit Court of Appeals said:

> "But even if the evidence justified a finding of negligence (which it does not), there was a total failure to establish that negligence was 'in whole or in part' the cause of the injury. The plain fact is Wolfe sustained fatal injuries as a direct result of his own affirmative and voluntary act in lighting a match while he was soaked with a mixture of gasoline and fuel oil . . . We hold that the evidence established as a matter of law that Wolfe's negligent act was the sole cause of the accident."

Is there any difference in the principle of law involved between striking a match while saturated with gasoline, and deliberately walking under falling ties which petitioner knew and saw were falling? In the *Wolfe* case the Court also said:

> "The defendant had the duty to use reasonable care to furnish Wolfe a safe place in which to perform his work. *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. ed. 1444; *Thompson* v. *Boles*, 8 Cir., 123 F. (2d), 487. *But defendant's obligation was not such as to impose liability for injury regardless of due care and regardless of whether the injury was one reasonably to be anticipated or foreseen as a natural consequence of defendant's act. In order to*

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recover under the Federal Employers' Liability Act, plaintiff had the burden of proving that defendant was negligent, and that such negligence in whole or in part caused Wolfe's injuries.'' Citing numerous authorities. (Italics ours.)

The Court's attention is called particularly to the recent case of *Eckenrode* v. *Pennsylvania Railroad Co.*, decided by this Court November 15, 1948, 93 L. ed., 64, (Advance Sheets), affirming the same case reported in 164 F. (2d) 996, in which case, the Court said:

> "Upon consideration of the record, the Court is of opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the petitioner, which can sustain a recovery for her."

Eckenrode, a trainman, was killed while walking beside the engine on a grade. He was seen to be 12 feet from the side of the engine, with the distance between him and the train increasing as he continued to walk down the spur. This places him below the level of the coal train since the spur is on a down-grade from a frog; the main line is upgrade from a frog. This is the last time the engineer saw Eckenrode until after the accident. The front brakeman, who was 22 cars ahead of the engine, saw Eckenrode walking down the spur, and then diagonally up the bank toward the train. He observed Eckenrode, as he walked up the embankment, stoop down and evidently pick up something. Later, he discovered marks which looked to him like finger marks where Eckenrode stopped. Somehow or other, Eckenrode's head was struck between the lap and lead lever and the cylinder head of the engine. . . . He had been a railroad man for more than forty years, and had worked this same run and done this very job for several years preceding the accident.

In this case, the plaintiff contended that it was the duty of Sunderlin, the engineer, to take precautions to keep from injuring Eckenrode. The Court said:

> "Out of this, we cannot see a scintilla of evidence on which negligence can be found. For a man to be charged with negligence in failing to take precautions there must be some danger towards which these precautions should be directed."

The Court held that there was no sufficient evidence, and affirmed the judgment of the District Court, which had set aside the verdict.

This Court upheld the Court of Appeals, and held there was no sufficient evidence to go to the jury.

To the same effect is *Brady* v. *Southern Railway Co.*, (also a case from North Carolina), 320 U. S. 476. There, the Court said:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict."

We submit, therefore, that certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

Wilmington, N. C.,
January 13, 1949.

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SUPREME COURT OF THE UNITED STATES

No. 472.—October Term, 1948.

E. A. Hill, Petitioner,
v.
Atlantic Coast Line Railroad Company.

On Writ of Certiorari to the Supreme Court of North Carolina.

[February 14, 1949.]

Per Curiam.

The petition for writ of certiorari is granted and the judgment of the Supreme Court of North Carolina is reversed. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54 (1943); *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350 (1943); and *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649 (1947).

Mr. Justice Frankfurter is of opinion that the petition for certiorari should not be granted for reasons indicated in his concurring opinion in No. 53, *Wilkerson* v. *McCarthy*, decided January 31, 1949.